IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EDWARD LOPEZ DE LA CRUZ, Petitioner.	2 CA-CR 2011-0088-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20022853

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Edward de la Cruz
Buckeye
In Propria Persona

B R A M M E R, Judge.

¶1 Petitioner Edward de la Cruz seeks review of the trial court's summary denial of his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. After a jury trial, de la Cruz was convicted of aggravated assault with a deadly weapon, a class two felony and dangerous-nature offense. The court found he

previously had been convicted of two historical prior felony convictions and sentenced him to a presumptive 15.75-year prison term. We affirmed his conviction and sentences on appeal. *State v. de la Cruz*, No. 2 CA-CR 2004-0229 (memorandum decision filed Nov. 23, 2005).

¶2 In his first post-conviction relief proceeding, initiated in 2006, de la Cruz alleged ineffective assistance of trial counsel. The trial court denied relief after an evidentiary hearing, and this court denied relief on review. *State v. de la Cruz*, No. 2 CA-CR 2007-0100-PR (memorandum decision filed Sept. 10, 2007). De la Cruz filed a second Rule 32 notice in October 2007, but the court dismissed the proceeding when he failed to file his petition for post-conviction relief as required by Rule 32.4(c). De la Cruz did not petition this court for review of that dismissal.

¶3 In his third post-conviction relief proceeding, filed in 2010, de la Cruz argued that the state had engaged in prosecutorial misconduct during sentencing, that the sentence imposed by the trial court was illegal, and that his sentencing and appellate counsel had been ineffective in failing to raise these issues. To avoid a determination that his claims were precluded by his failure to raise them previously, *see* Ariz. R. Crim. P. 32.2(a)(3), he maintained these claims were grounded in newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), or a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g). *See* Ariz. R. Crim. P. 32.2(b) (claims based on Rule 32.1(d), (e), (f), (g), and (h) not subject to preclusion when notice sets forth specific exception and "the reasons for not raising the claim in the previous petition or in a timely manner"). Apparently referring to Rule 32.1(h), de la Cruz also asserted, in a conclusory fashion, that "this is an 'actual

innocence' case with newly-discovered evidence" that also "proves trial counsel . . . was ineffective/incompetent," but he failed to identify any of the "exculpatory evidence" he claimed to have discovered that would support this claim. The trial court dismissed de la Cruz's petition, finding each of his claims precluded by his failure to raise them in earlier proceedings. *See* Ariz. R. Crim. P. 32.2(a). This petition for review followed.

¶4 On review, de la Cruz argues the court abused its discretion in dismissing his claims as precluded and asserts seventeen "issues presented for review." Many of these issues are conclusory assertions that either were not decided by the trial court or were unnecessary to its ruling; others pertain to claims not fairly presented in de la Cruz's petition below.[1] We will not consider these issues on review.[2] *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to trial court); *see also* Ariz. R. Crim. P.

[1]In addition to finding de la Cruz's claims precluded, the trial court cited "additional reasons" that he had failed to state any colorable claim entitling him to relief. Although we find no fault with the court's conclusions on the merits of de la Cruz's claims, we need not address this additional analysis because we find the court correctly dismissed de la Cruz's claims as precluded.

[2]Accordingly, we do not consider the following issues identified by de la Cruz: (A) denial of the right to counsel at every critical stage of the proceeding; (B) "unconstitutional use by the state of perjured testimony"; (C) state's reliance at sentencing on unconstitutionally obtained prior conviction; (D) sentence not imposed in accordance with rule or statute; (E) unconstitutional trial in absentia; (F) obstruction by state officials of right to appeal; (I) facts underlying claims are sufficient to meet "AEDPA exception (B)"; (J) false imprisonment; (K) fundamental miscarriage of justice; (L) plain error; (M) "New trial; In The Interest Of Justice"; (O) "Improper/Excessive Sentencing—Eighth Amendment"; (P) sentence imposed in violation of the Constitution or laws of the United States; (Q) sentence enhanced "using illegal 'catch-all' aggravating factors" in violation of *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009).

32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court . . . which the defendant wishes to present" for review).

¶5 To the extent de la Cruz seeks review of the trial court's determination that his claims are precluded, we find no abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (court's summary denial of post-conviction relief reviewed for abuse of discretion).[3] The court clearly identified, thoroughly addressed, and correctly resolved de la Cruz's argument that he had raised non-precluded claims based on "[n]ewly discovered material facts . . . [that] probably would have changed the verdict or sentence," Ariz. R. Crim. P. 32.1(e), as well as his argument that *Blakely v. Washington*, 542 U.S. 296 (2004), was a "significant change in the law that if determined to apply to [his] case would probably overturn [his] conviction or sentence," Ariz. R. Crim. P. 32.1(g). Moreover, the court resolved these claims in a manner sufficient to permit this or any other court to conduct a meaningful review, and no purpose would be served by repeating the court's analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Instead, we adopt it.

[3]Although the trial court did not address specifically in its ruling the grounds on which it found precluded de la Cruz's ineffective assistance of appellate counsel claim, its ruling on this issue is correct. This claim was not precluded by de la Cruz's failure to raise it in his first Rule 32 petition, because the same attorney had represented him on appeal and in that proceeding. *See Bennett*, 213 Ariz. 562, ¶¶ 14-16, 146 P.3d at 67 (defendant represented by same counsel on appeal and in first Rule 32 proceeding not precluded from claiming ineffective assistance of appellate counsel in second Rule 32 proceeding). It was precluded, however, by his failure to raise it in his second Rule 32 proceeding, which was dismissed as abandoned when he failed to file a petition for post-conviction relief. *See id.*; *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 5-6, 23, 203 P.3d 1175, 1177, 1180 (2009) (recognizing "preclusive effect" when Rule 32 proceeding is dismissed).

¶6 Although the trial court did not address de la Cruz's implicit assertion that his claims are not precluded because he is "actual[ly] innocen[t]," *see* Ariz. R. Crim. P. 32.1(h), we find no fault with the court's ruling. De la Cruz's veiled reliance on Rule 32.1(h) was far from clear, and he provided no basis for this narrow exception to preclusion, which requires a defendant to "demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt." *Id.* De la Cruz did not even attempt to identify any such evidence in his petition below and, indeed, appeared only to be challenging his sentence, not his conviction.[4]

¶7 For the foregoing reasons, we grant review but deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

[4]Nor does de la Cruz develop his assertion of "actual innocence" on review; instead, he maintains only that "[t]he 'exculpatory evidence' is so sensitive that it can only be effectively presented by a professional attorney." De la Cruz's associated request for appointment of counsel is denied.